No. 80-1043

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARLOS GERDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court improperly held him in civil contempt for refusing to testify before the grand jury, and that the court of appeals improperly calculated the period during which appellant should be deemed to have been in contempt.

1. Following his conviction on a guilty plea to six counts of importing marijuana into the United States, appellant was subpoenaed to testify before a federal grand jury in the Eastern District of Texas. On January 25, 1980, the district court granted him immunity under 18 U.S.C. 6002 and ordered him to testify. Petitioner refused to comply with the order, claiming that his plea agreement excused him from the obligation to testify before the grand jury. One of the paragraphs of that agreement provided as follows (Pet. App. 2):

> It is understood by all parties hereto [that petitioner] has entered no agreement to cooperate in this cause or other investigations.

The district court concluded that this provision did not mean that the government could not call upon petitioner to testify before a grand jury at any time in the future. Rather, the court held, the agreement simply meant that petitioner would not be required to testify in the trial that was taking place at the time he entered his plea of guilty (January 29, 1980, Tr. 100-101). The district court therefore held petitioner in contempt and ordered him confined until he agreed to testify or the term of the grand jury expired. Petitioner was already incarcerated, serving his sentence for marijuana smuggling, and the court accordingly ordered that the period spent in custody pursuant to the civil contempt adjudication not be credited towards his sentence for smuggling (*id.* at 103-104).

2. On appeal, the court of appeals held that it could not determine on the existing record whether the plea agreement justified petitioner's recalcitrance. Accordingly, the court remanded the case to the district court for an evidentiary hearing to determine the understanding of the parties regarding the meaning of the pertinent language of the plea agreement (Pet. App. 1-4).

At the hearing, the Assistant United States Attorney who had negotiated the plea agreement testified that he understood the language in question to signify only that the plea agreement itself did not include a promise by petitioner to cooperate. He testified that the disputed language had not been added to the agreement in order to free petitioner from any obligation to testify in the future, but rather to make clear that failure to cooperate, by testimony or otherwise, would not be deemed a breach of the agreement that would entitle the government to reinstate those counts it had agreed to dismiss (June 5, 1980, Tr. 45). The district court

adopted this interpretation of the agreement, finding that the pertinent language of the agreement did not mean that petitioner could not be called as a witness in any subsequent proceeding (Pet. App. 8-9). The court directed that petitioner not be given credit on his criminal sentence for the time he had spent in custody pursuant to the contempt order and until he purged himself of that contempt (Pet. App. 9).

3. On the basis of this finding, the court of appeals upheld petitioner's contempt citation. The court held that the district court's construction of the plea agreement was not "clearly erroneous as to the intent of the parties" (Pet. App. 5-6). The court also rejected petitioner's argument that he should not be held in contempt as of January 29, 1980, the date of the original contempt adjudication, but only as of June 5, 1980, the date of the evidentiary hearing ordered by the court of appeals (Pet. App. 6).

4. Petitioner first claims (Pet. 4-6) that the district court deviated from the mandate of the court of appeals by construing the agreement the way it did. This claim is frivolous. The court of appeals ordered the district court to hold an evidentiary hearing in order to determine the parties' understanding of the meaning of the agreement. In particular, the court directed that the district court obtain the testimony of the Assistant United States Attorney who negotiated the agreement, as well as testimony from petitioner's counsel and another attorney who negotiated a somewhat similar agreement on behalf of another defendant (Pet. App. 4). The district court heard testimony from all three witnesses and also heard testimony from petitioner himself. Following the hearing, the district court made findings regarding the parties' understanding of the agreement—precisely what the court of appeals had ordered it to do (Pet. App.

8-9). There is thus no basis whatsoever for petitioner's assertion that the district court did not follow the court of appeals' mandate.[1]

5. Petitioner further contends (Pet. 6-7) that the court of appeals erred by holding that the period of contempt should be calculated from January 29, 1980, rather than June 5, 1980.[2] He claims that the district court improperly gave retroactive effect to its June 5 order.

When the district court entered its initial contempt adjudication, it properly ordered that the running of petitioner's criminal sentence be suspended until he purged himself of that contempt or until the grand jury's term expired. See *United States* v. *Dien*, 598 F. 2d 743 (2d Cir. 1979); *In re Garmon*, 572 F. 2d 1373 (9th Cir. 1978). On remand, the district court reaffirmed that petitioner's plea agreement did not excuse his silence before the grand jury and therefore ordered that his criminal sentence remain suspended as of that date. Petitioner contends that because the court of appeals initially "vacated" the district court's original order of contempt, it could not ultimately uphold the district court's order of contempt effective as of January 29, 1980.

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[1]The court of appeals had concluded that the bare language of the plea agreement was ambiguous (Pet. App. 3-4, 6) and accordingly remanded for taking of parol evidence as to the meaning of the agreement. The district court's reiterated finding upon remand—that, viewed in light of the additional evidence, the plea agreement did not excuse petitioner from testifying before the grand jury—did not contravene the court of appeals' mandate. In any event, the court of appeals did not accept petitoner's suggestion of a conflict in its opinion after the evidentiary hearing. The court of appeals is the best arbiter of whether the district court disobeyed the earlier mandate.

[2]This is relevant because petitioner's criminal sentence has been tolled during the pendency of the contempt proceedings. Thus, if the contempt order were effective as of June 5 rather than January 29, he would receive credit on his criminal sentence for the period between those two dates.

Petitioner mistakes the effect of the court of appeals' April 4 ruling in this case. When the court of appeals remanded the case to the district court, it did so only for a further evidentiary hearing to aid it in the "ultimate resolution of this case" (Pet. App. 4). Clearly, the court's purpose in remanding for a further evidentiary hearing was to help it determine the validity of the January 29 finding of contempt—not to determine whether the district court was inclined to make a new finding of contempt. The district court's finding, likewise, established facts indicating that the original contempt sanction was justified—not that something had happened on June 5, 1980, to justify the imposition of a contempt order effective as of that date. See *United States* v. *Mars*, 553 F. 2d 508 (6th Cir. 1977).

It is clear from the April 4, 1980, order of the court of appeals that the court meant to retain jurisdiction while the case was on remand. Accordingly, the district court was empowered only to make the inquiry that the court of appeals had ordered. *United States* v. *Hitchmon*, 602 F. 2d 689, 692 (5th Cir. 1979) (en banc); 9 *Moore's Federal Practice* para. 203.11, at 3-44 to 3-48 (2d ed. 1980). Thus, the district court was not empowered to hold *de novo* contempt proceedings or to issue a *de novo* contempt order to which sanctions would attach as of that date. Instead, as the court of appeals made plain, it was seeking only further findings from the district court as to the meaning of the plea agreement, to aid in the continuing appellate review of the January 29 order. Thus, it was proper to hold that the contempt in this case was effective as of that date.[3]

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[3]Petitioner places great weight on the court's statement in its first opinion that it "vacated" the contempt judgment (Pet. 7). However, it is for the court of appeals to determine the meaning of its orders, and in this case the court of appeals did not ascribe the same significance to that term as does petitioner. Petitioner does not claim that he was prejudicially misled by the use of that term in the court's first opinion,

The entire period between January 29 and June 5 constituted an integral part of the appellate process in this case, for the remand to the district court simply perfected the record on appeal.[4] It is clear beyond question, however, that commitment for an adjudicated contempt may continue during the pendency of an appeal. See, *e.g.*, *Yates* v. *United States*, 356 U.S. 363, 367 (1958); *Field* v. *United States*, 193 F. 2d 86, 88, 91 (2d Cir. 1951) (Reed, Circuit Justice); compare 28 U.S.C. 1826(b). There is no reason to apply a different rule here. Any conceivable hardship which might arise from commitment or tolling of sentence pending appellate review is limited by the expedited appeal requirement of 28 U.S.C. 1826.[5] Moreover, both the district court and the court of appeals are vested with discretionary authority to grant a stay--or bail in an appropriate case--pending appeal. See 28 U.S.C. 1826(b), Fed. R. App. P. 8(a); cf. Fed. R. App. P. 9(b); Fed. R. Crim. P. 46(c); 18 U.S.C. 3148; compare *In re Bart*, 82 S. Ct. 675 (1962) (Warren, Circuit Justice); *Howard* v. *United States*, 182 F. 2d 908, 915 (8th Cir. 1950), with *Patterson* v. *United States*, 75 S. Ct. 256 (1954) (Frankfurter, Circuit Justice); *Field* v. *United States, supra*, 193 F. 2d at 91; *In re Weir*, 520 F. 2d 662, 667 (9th Cir. 1975). At no time, however, did petitioner seek a stay pending appeal of the sentence-tolling

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nor could he. There is no claim that he did not realize he was under the continuing compulsion to testify between April 4, 1980 (the date of the court of appeals' first order) and June 5, 1980 (the date of the district court's second order). And, since he has at no time purged himself of the contempt, it is clear that any ambiguity as to the pendency of the contempt order did not prejudice him.

[4]The court of appeals treated its proceedings following the remand as "renew[al]" of petitioner's original appeal, rather than as a separate appeal (Pet. App. 5).

[5]Petitioner has not argued, nor could he, that the court of appeals or the district court acted less than expeditiously.

provisions of the district court's January 29 contempt adjudication. Accordingly, petitioner should not be heard to complain of the failure of the courts below to suspend tolling of his sentence.

6. The decision of the court of appeals is not contrary to any decision of this Court or any other court of appeals. The question presented is highly fact-bound and lacks general applicability. Further review by this Court is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

DOJ-1981-02